No. 84-1560 (10)

In The
Supreme Court of the United States
October Term, 1984

THE PRESS-ENTERPRISE COMPANY,
a California corporation,
Petitioner,

vs.

THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA,
FOR THE COUNTY OF RIVERSIDE,
Respondent

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

ROBERT RUBANE DIAZ,
Defendant.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

AMICUS CURIAE BRIEF OF STATE OF CALIFORNIA IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The State of California, by its Attorney General John K. Van de Kamp, respectfully submits this brief as *amicus curiae* pursuant to Supreme Court Rule 36.4. This case questions the constitutionality of California Penal Code section 868, and California, of course, has an interest in defending the constitutionality of that statute. Supreme

Court Rule 28.4(c). The Attorney General of California is further interested in defending all constitutional guarantees, including the First Amendment rights of the press and the public. California Constitution, Art. V, § 13.

The Attorney General represents the People of the State of California in appeals from criminal convictions and, on occasion, during criminal proceedings which precede convictions. He is therefore concerned with ensuring that in all criminal proceedings in California, the constitutional right to a fair trial is protected without undue infringement upon the constitutional rights of the public and, in particular, of the press, to have access to and observe government functions.

In light of these responsibilities and concerns, the Attorney General of California wishes to participate in this action to present arguments which, while supporting petitioner's claim that the California Supreme Court erred in rejecting petitioner's First Amendment claims, also support the constitutionality of California Penal Code section 868.

California's position, simply stated, is that the California Supreme Court erroneously failed to analyze California Penal Code section 868 according to First Amendment requirements of public access. Once these First Amendment rights are recognized, the California court should be permitted to reconstrue the statute so as to encompass applicable constitutional principles. The Attorney General believes the statute will then be found to be an appropriate balance between the right to a fair trial and the right of public access. Furthermore, the California court will then be able to reevaluate the facts of this case

in light of the public access rights guaranteed by both the First Amendment and the California statute.

The decision below by the California Supreme Court jeopardizes both First Amendment rights and the co-extensive statutory rights established by California Penal Code section 868. The Attorney General of California therefore joins with petitioner in seeking a reversal of the decision below insofar as it concluded that First Amendment access rights do not extend to preliminary hearings, and also seeks to vacate and remand the case so that the California Supreme Court may properly construe and apply state law consistent with constitutional requirements

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SUMMARY OF ARGUMENT

The First Amendment guarantees a right of public access to criminal judicial proceedings in which critical decisions are made and openness will lead to increased public confidence in the criminal justice system. Members of the public have the right to observe the administration of criminal justice both in order to satisfy themselves that justice is being done and in order to serve as a check to ensure that justice is, indeed, being done.

Preliminary hearings in California play a critical role in the criminal justice system, and the events which occur during a preliminary hearing frequently determine the outcome of a criminal case. Public access to preliminary hearings will promote greater understanding and acceptance of the criminal justice system, while closure of such

hearings would undermine public confidence in that system. Therefore, the public, including the press, has a constitutional right of access to preliminary hearings.

Nevertheless, this right of access is not absolute, and must be balanced against countervailing concerns of equal dimension. The right of the accused to a fair trial, the right of privacy of jurors or of witnesses, and other compelling concerns may outweigh the right of public access.

California Penal Code section 868 (hereinafter, "section 868") properly establishes a statutory right of public access to preliminary hearings, and further provides that this presumption of public access may be overcome only if closure is necessary to preserve other competing interests. The First Amendment requires no greater right of access than section 868.

Because the California Supreme Court erroneously failed to recognize the First Amendment right of public access to preliminary hearings, that court has not had the opportunity to review section 868 in light of its constitutional implications. This Court should first determine that the First Amendment applies to preliminary hearings[1], and then the California Supreme Court should be permitted to reconsider its interpretation of section 868, and the applicability of that section to the facts of the instant case, in light of the constitutional right of public access.

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1. The importance of First Amendment rights and the expectation that the instant controversy will reoccur until finally resolved justify this Court's review of this case. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982).

ARGUMENT

I

THE FIRST AMENDMENT RIGHT OF PUBLIC ACCESS EXTENDS TO PRELIMINARY HEARINGS.

The right of the public, including the press, to attend criminal judicial proceedings has received expanded recognition in the past five years. This Court has held that the First Amendment[2] establishes a right to public criminal trials (*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580, 583, 587, and 599 (1980) and *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982)), and that this right of public access extends to criminal *voir dire* proceedings (*Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505, 508-510 (1984)).

Furthermore, in *Gannett Co. v. De Pasquale*, 443 U.S. 368 (1979), a majority of the members of the Court would have found a constitutional right of public access to pretrial hearings, either under the First Amendment (*Id.*, at 397 (Powell, J., concurring)) or under the right to a public trial guaranteed by the Sixth Amendment[3] (*Id.* at 434 (Blackmun, J., concurring and dissenting, with Brennan, J., White, J., and Marshall, J.)). While the majority opinion in *Gannett* did not decide the First Amendment question, the Court did hold that "the actions of the trial judge

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2. The First Amendment freedoms of speech and of the press are, of course, applicable to states through the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925); and *Near v. Minnesota*, 283 U.S. 697, 707 (1931).

3. The Sixth Amendment right to a public trial is also applicable to the states through the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S .145, 148 (1968).

here were consistent with any right of access the petitioner may have had under the First and Fourteenth Amendments" (*Id.*, at 392).

The instant case squarely addresses the issue reserved in *Gannett*, at 392—whether the First Amendment guarantees public access to pretrial hearings. Based upon the reasoning in these earlier cases and based upon the critical role preliminary hearings serve in the criminal justice system in California, the conclusion must be that a constitutional right of public access exists.

A. The Public Has the Right to Attend Criminal Proceedings in Order to Have Confidence in the Criminal Justice System.

One of the two major reasons relied upon to support a right of public access to criminal proceedings has been "the importance of the public's having accurate information concerning the operation of its criminal justice system." *Gannett*, at 397 (Powell, J., concurring).[4] The opinions of this Court and of various members of this Court have emphasized that public awareness of criminal proceedings both promotes public acceptance of the justice system and, moreover, actually contributes to promoting justice by preventing abuse of power.

Openness encourages public trust because of the "significant community therapeutic value" which results from

4. The second major reason has been the history of openness (*Richmond Newspapers*, at 565 (plurality opinion)), but this Court has also said that whether First Amendment rights may be restricted depends not on historical openness but on the state's interest supporting closure (*Globe Newspaper*, at 605 n. 13).

public observation (*Richmond Newspapers*, at 570 (Burger, C. J., for plurality)). Society needs to know that justice is being served.

> "[T]he open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. . . .
>
> "The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.'" (*Id.*, at 571).

Openness "fosters an appearance of fairness, thereby heightening public respect in the judicial process" (*Globe Newspapers*, at 606), and gives the public "confidence that standards of fairness are being observed" (*Press-Enterprise*, at 508). Openness dispels any fear that the criminal justice system is either persecuting unjustly or failing to pursue justice, and thus benefits both the accused and society as a whole.

Openness provides a further benefit by ensuring that "all participants in the criminal justice system are subject to public scrutiny as they conduct the public's business of prosecuting crime" (*Gannett*, at 412 (Powell, J., concurring)). Openness thus deters any abuse of power, and "has a ***structural*** role to play in securing and fostering our republican system of self-government" (*Richmond Newspapers*, at 587 (Brennan, J., concurring)). See also *Globe Newspaper*, at 606 (The public serves as "a check upon the judicial process.")

These dual benefits of openness were succinctly described by this Court last year in its decision extending the right of public access to juror *voir dire* examination. As the Court stated:

> "Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise,* at 508.

Since openness promotes a criminal justice system which both seems fair and is fair, and secrecy undermines public confidence in the system, the First Amendment right of public access must extend to all critical phases of criminal proceedings. When decisions are made which determine the outcome of prosecutions, members of the public, including the press, have a constitutional right to be able to assure themselves that justice is in fact being served.

B. The Critical Role of Preliminary Hearings Necessitates Public Access.

Preliminary hearings have been held to be "a 'critical stage' of the State's criminal process" in California (*Hawkins v. Superior Court,* 22 Cal.3d 584, 588 (1978) quoting *Coleman v. Alabama,* 399 U.S. 1, 9-10 (1970)). Even while failing to recognize a constitutional right of access to preliminary hearings, the California Supreme Court has acknowledged that "[p]reliminary hearings are a critical step in the accusatory process" (*San Jose Mercury-News v. Municipal Court,* 30 Cal.3d 498, 510 (1982)).

Many of the disputes which would otherwise occur at trial are often resolved during the preliminary hearing. The magistrate hears and weighs the evidence and resolves conflicts in determining probable cause (*Johnson v. Superior Court,* 15 Cal.3d 248, 252 (1975); *Esteybar v. Municipal Court,* 5 Cal.3d 119, 127 (1971); and *Jones v. Superior Court,* 4 Cal.3d 660, 667 (1971), and performs "adjudicatory functions akin to the functions of a trial judge" (*People v. Uhlemann,* 9 Cal.3d 662, 667 (1973)).

A case may actually be submitted for trial on the transcript of the preliminary hearing (*Bunnell v. Superior Court,* 13 Cal.3d 592, 602 (1975).[5] And if, like the majority of cases, a case does not proceed to trial, but is resolved by a guilty plea, the preliminary hearing is likely to be the sole adversary hearing which occurs.[6] (White & Wilson, *The Preliminary Hearing in California: Adaptive Procedures in a Plea Bargain System of Criminal Justice,* 28 Stanford L. Rev. 1207, 1220 (1976)).

In sum, preliminary hearings perform a wide variety of functions which would otherwise occur at trial and would

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5. As reported in 1985 Annual Report, Judicial Council of California, in Fiscal Year 1983-84, 66,534 felony complaints were disposed of by California Superior Courts, and 59,824 of these dispositions were before trial (*id.,* at 119). In addition, during the same period the California lower courts disposed of 98,338 felony complaints (*id.,* at 134), and 53 percent, or approximately 52,119 of these dispositions occurred after preliminary hearings (*id.,* at 139), with 5 percent (approximately 4,956) of these being dismissed on a finding of no probable cause (Judicial Council, unreported statistics). The remaining 47 percent (approximately 46,219) were disposed of before preliminary hearing (23 percent by dismissal and 24 percent by guilty plea (*id.,* at 140)). This means that 88,342 felony complaints (59,824 in Superior Court plus 52,119 in the lower courts, less 23,601 lower court dispositions (24 percent) certified up on a guilty plea before preliminary hearing) were disposed of before trial but after preliminary hearing.

6. The adjudicatory and adversary nature of preliminary hearings distinguishes these judicial proceedings from grand jury deliberations for which no public right of access exists. As explained in *Branzburg v. Hayes,* 408 U.S. 665, 684 (1971), "the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations."

therefore, under established law, be subject to public scrutiny.[7]

Since decisions made during preliminary hearings often substitute for decisions at trial, the same concern for promoting public confidence which underlies public access to criminal trials supports public access to preliminary hearings. The public needs the same assurance that justice is being done during preliminary hearings that it needs for other determinative phases of criminal proceedings. Just as public access to criminal trials deters any abuse of power, "the preliminary hearing is intended as a judicial check on the prosecutor's initial discretionary charging powers" (White & Wilson, at 1220), and the public needs to have confidence that this process is fair. Furthermore, "public scrutiny will have the same beneficial effect on the quality and accuracy of the proceeding as it would in a trial." (Fenner & Koley, *Access to Judicial Proceedings: to Richmond Newspapers and Beyond.* 16 Harv. C.R.-C.L.L.Rev. 415, 435 (1981)). As summarized in Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings,* 91 Harv.L.Rev. 1899, 1909 (1978):

> "Because the rationale supporting the right of public access covers these [preliminary] proceedings as well, they must be considered part of the trial that is presumptively open to the public. Such proceedings air matters of public concern that may not be addressed at trial, so that if they are kept secret, discussion of the issues involved may never surface."

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7. For an extensive discussion of the multitude of functions performed by preliminary hearings in California, see Graham & Letwin, *The Preliminary Hearing in Los Angeles: Some Field Findings and Legal-Policy Observations,* 18 U.C.L.A. L. Rev. 636 (1971).

Even while rejecting any constitutional right of public access, the California Supreme Court has recognized that open preliminary hearings would serve the public interest, stating that "scrutiny of preliminary hearings does, of course, have many of the societal benefits that public trials and open pretrial suppression hearings help ensure." (*San Jose Mercury-News,* at 510).

The beneficial effects of openness support a constitutional right of public access to preliminary hearings. As Justice Powell has stated, "the public's interest in this proceeding often is comparable to its interest in the trial itself" (*Gannett,* at 397 n.1 (Powell, J., concurring.)). This public interest in openness may result in public suspicion of the criminal justice system if the public is excluded from preliminary hearings. As explained in Geis, *Preliminary Hearings and the Press,* 8 U.C.L.A. L. Rev. 397, 413 (1961):

> "Closed hearings can lead to great amounts of misinformation and misinterpretation, as well as suspicion, and thus be more of an evil than the abuse which they are intended to correct."

Because preliminary hearings serve a critical role in the criminal justice system, because the public interest in ensuring fairness in preliminary proceedings is no less than the public interest in fair trials, and because openness fosters public confidence and the reality that justice is being served, the First Amendment right of public access extends to preliminary hearings.

II

PUBLIC ACCESS TO PRELIMINARY HEARINGS MAY BE LIMITED WHERE NECESSARY IN ORDER TO SERVE OTHER COMPELLING INTERESTS.

The applicability of the First Amendment right of access to preliminary hearings does not mean that all closures of preliminary hearings are unconstitutional. First Amendment rights have never been held to be absolute, and may be outweighed by compelling competing interests. The Attorney General of California submits that California Penal Code section 868 statutorily authorizes California courts to engage in precisely the same balancing process required under the First Amendment, and that once this Court establishes the constitutional right of public access, and the parameters of that right, California courts will interpret section 868 so as to comply with constitutional requirements.

A. Any Denial of Public Access Must Be Justified By Compelling Interests And Must Be Narrowly Tailored To Serve Those Interests.

In cases where this Court has held that the First Amendment guarantees a right of public access to criminal justice proceedings, the Court has also held that this right is not without limit. Countervailing interests such as the right of the accused to a fair trial[8] and the privacy

8. The defendant's right to a fair trial is an overriding consideration which may require closure. *Richmond Newspapers* at 564 (plurality opinion); *Cannett*, at 393.

rights of victims or witnesses[9] or jurors[10] must also be taken into consideration, and may justify closure despite the presumption of openness. As stated in *Globe Newspaper*, at 606, "[a]lthough the right of access to criminal trials is of constitutional stature, it is not absolute." See also *Richmond Newspapers*, at 581 n. 18 (plurality opinion) and at 600 (Stewart, J., concurring).

However, while First Amendment rights are not absolute, any curtailment of such fundamental rights must be strictly scrutinized to ensure that the limitations are both essential to serve competing interests and no greater than necessary to satisfy these other interests. The applicable standard of review for denials of the right of public access to criminal proceedings is identical to that used to review other infringements of fundamental rights:

> "[I]t must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspapers*, at 607.
>
> "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise*, at 510.

In order to ensure that this standard is satisfied, the Court has set forth various prerequisites which should be satisfied before closure is approved. The interests served

9. In *Globe Newspaper*, at 607, the Court recognized that safeguarding the well-being of minor victims of sex crimes was a compelling interest.

10. In *Press-Enterprise*, at 511-512, the Court recognized that valid privacy interests of jurors may compel denying access to certain *voir dire* information.

by closure must be articulated and supported by findings that closure is essential (*Press-Enterprise,* at 510; *Richmond Newspapers,* at 580 (plurality opinion)), and alternatives to closure must be considered (*Press-Enterprise,* at 511; *Richmond Newspapers,* at 580-581 (plurality opinion)). Furthermore, members of the public including the press, who object to closure should be given an opportunity to be heard (*Gannett,* at 392-393).

Any "failure to articulate findings with the requisite specificity" or "failure to consider alternatives to closure" denies adequate protection to First Amendment rights (*Press-Enterprise,* at 513). But there is no constitutional informity where a closure order is narrowly tailored to serve compelling interests (*Gannett,* at 393; *United States v. Smith,* — F.2d — (3d Cir., Nov. 6, 1985).

B. Section 868 Incorporates The 'Compelling Interest' Test Required By The First Amendment.

Since the California Supreme Court erroneously concluded that "the First Amendment access right does not extend to preliminary hearings" (*Press-Enterprise Co. v. Superior Court,* 37 Cal.3d 772, 777), it had no opportunity to review section 868 in light of the constitutional requirements discussed above. A remand is therefore appropriate to permit reconsideration of the state law questions as to the proper interpretation of the standard for closure established in section 868 and whether the facts of the instant case satisfy the statutory standard.[11]

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11. Because the California Supreme Court erroneously rejected the applicability of the First Amendment, it construed

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This Court has been asked by petitioner to rule that section 868 violates the First Amendment, and a response to this claim is required to show that section 868 is susceptible to a constitutional interpretation. The Attorney General of California urges this Court to deny petitioner's request to rule that the state statute is unconstitutional on its face, and instead to permit the California Supreme Court to reconstrue the statute according to constitutional standards.

California Penal Code section 868 provides, in pertinent part:

> "The examination shall be open and public. However, upon the request of the defendant and *a finding* by the magistrate *that exclusion of the public is necessary* in order to protect the defendant's right to a fair and impartial trial, the magistrate shall exclude from the examination every person except the clerk, court reporter, and bailiff, the prosecutor and his or her counsel, the Attorney General, the district attorney of the county, the investigating officer, the officer having custody of a prisoner witness while the prisoner is testifying, the defendant and his or her counsel, the officer having the defendant in custody and a person chosen by the prosecuting witness who is not himself or herself a witness but who is present to provide the prosecuting witness moral support, provided that the person so chosen shall not discuss prior to or during the preliminary examination the testimony of the prosecuting witness with any person, other

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section 868 under a misperception of federal law. This Court should therefore vacate and remand "so that the [state] court may reconsider the state law question free of misapprehensions about the scope of federal law." *Three Affiliated Tribes v. Wold Engineering, P.C.,* 467 U.S. 138, — [104 S.Ct. 2267, 2277] (1984).

than the prosecuting witness, who is a witness in the examination." (Emphasis added).

Section 868 therefore requires a specific finding that closure is necessary to protect the right of the accused to a fair trial.[12] The word "necessary" encompasses the same standard of being narrowly tailored to serve compelling interests that the First Amendment imposes on closure orders. See *Globe Newspaper,* at 607. (The denial of access must be "necessitated.").

Section 868 was enacted as an urgency measure in its current form in 1982. (Cal. Stats. 1982, c. 83, p. 245, § 3). It has been described as a "legislative accommodation of the competing interests in free speech and fair trial" (*Eversole v. Superior Court,* 148 Cal.App.3d 188, 196-197 (1983)). A corollary statute enacted together with section 868 and balancing public access against privacy rights has been held to require specific findings of compelling interest and consideration of alternatives to closure (*Eversole,* at 200-201). Furthermore, closure decisions must be made on a case-by-case basis. *Compare Eversole,* at 199, with *Globe Newspaper,* at 608.

The word "necessary" connotes that closure should not be permitted unless essential (Webster's Third New International Dictionary, Unabridged (1961) 1511). And since this statutory requirement is clear and unambiguous, the word "necessary" should be given its customary import (*People v. Belleci,* 24 Cal.3d 879, 884 (1979)).

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12. California Penal Code sections 868.5 and 868.7 provide additional statutory authority for closure of preliminary hearings in order to protect privacy rights and security needs of witnesses. Such closure on a case-by-case determination of necessity was approved in *Globe Newspaper,* at 609.

Furthermore, the California Supreme Court recognized in its decision below that the California "Legislature intended the courts to determine the appropriate standard" of necessity under section 868 (*Press-Enterprise Co. v. Superior Court,* 37 Cal.3d 772, 779 (1984)). Once this Court determines that the appropriate standard for closure of preliminary hearings is the "compelling interest" test discussed above, California courts will be able to apply this standard in ruling upon motions under section 868.

Section 868 is therefore susceptible to an interpretation fully consistent with First Amendment requirements. One Justice of the California Supreme Court has already stated that the right of access under section 868 is co-extensive with First Amendment rights (*Press-Enterprise, Co. v. Superior Court,* 37 Cal.3d 772, 782 (1984) (Grodin, J., concurring)). Once this Court concludes that the First Amendment right of public access extends to preliminary hearings, the matter should be remanded so as to permit the California court to interpret section 868 consistent with constitutional requirements.

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CONCLUSION

For the foregoing reasons, amicus curiae Attorney General of the State of California respectfully urges this Court to hold that the First Amendment does guarantee a right of public access to preliminary hearings, and to reverse the decision below insofar as it reaches a contrary conclusion. Furthermore, the Attorney General requests that this matter be remanded so as to permit the Cali-

fornia court to construe section 868 in accordance with constitutional requirements.

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Respectfully submitted

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